No. 8594

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,
Appellant and Cross-Appellee,

v.

TWOHY BROTHERS COMPANY,
a corporation,
Appellee and Cross-Appellant.

ANSWERING BRIEF OF TWOHY BROTHERS TO APPELLANT'S OPENING BRIEF

Upon Appeal and Cross-Appeal from the District Court of the United States for the District of Oregon.

HON. JAMES ALGER FEE, *Judge.*

DELANCEY C. SMITH,
Balfour Building,
San Francisco, California,

W. LAIR THOMPSON,
McCAMANT, THOMPSON, KING & WOOD,
American Bank Building,
Portland, Oregon,
Attorneys for Twohy Brothers Company, Appellee and Cross-Appellant.

F. W. BALTES AND COMPANY, PRINTERS, PORTLAND

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CODE REFERENCES AND TEXTBOOKS

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ANSWERING BRIEF OF APPELLEE

In litigation to recover on a railroad construction contract appellant, Northern Pacific Railway Company (defendant in the trial court), suffered a judgment based on three counts in the complaint:

(1) For the stipulated price for conducting a commercial haul of which defendant wrongfully deprived plaintiff;

(2) For a balance due plaintiff for hauling bridge construction materials for which defendant had refused to pay the prices stipulated in the contract;

(3) For a balance due on book accounting.

The judgment on book accounting was entered pursuant to stipulation. The appellant is challenging the judgment on the commercial haul and the judgment on the bridge material haul. The commercial haul here involved consisted of saw logs which the Clearwater Timber Company had cut and banked along the right of way to be

moved as soon as rail was laid on the lower end of the railroad under construction. This item was frequently referred to as "log haul" at the trial. The item for hauling to the several bridge sites of materials to be used in erecting bridges was frequently referred to as "material haul".

To keep the record clear, we challenge the accuracy of the assumption in appellant's opening statement (B. p. 5) that appellee does not question the contention that plaintiff's right to additional compensation for construction work depends upon allowance by the chief engineer. The complaint is sufficient to permit recovery on two theories: (1) misconduct of the chief engineer, and (2) breach of contract by departing from representations on which bids were submitted. The complaint was not challenged. Ruling out as representations the information upon which bids were submitted effectually prevented recovery for breach of contract. We have tested the correctness of that ruling by plaintiff's first assignment of error on cross-appeal (Cross-appellant's opening brief, p. 8). The assumption of appellant (and the trial court) is that the only remedy, in absence of a decision by the chief engineer, is by abandonment of the contract. There are many such cases where the entire claim can be thus presented. We think it is not the only method of relief. Materially changing the work represented is a breach of contract.

Faber v. City of New York (1918) 222 N. Y. 255; 118 N. E. 609, 610;
National Contracting Co. v. Hudson River Water Power Co. (1908) 192 N. Y. 209; 84 N. E. 965, 967.

In the instant case defendant's theory would compel plaintiff to abandon either the construction claim or the commercial and material haul claims—the same complaint could hardly abandon the contract and claim on contract. The law, however, affords a remedy for every wrong. If departure from representations is a breach, suable as such, remedy for each wrong is available.

Plaintiff challenges the statement on appellants brief (p. 7) that there was a "newly built line" of railroad. This assumption appears throughout appellant's brief in discussing the log haul. There was in fact no newly built line. Grade had been thrown up and rails laid, but no portion of the line was completed or ready for traffic, other than such as could be conducted during construction (Finding XV, R. 168); the entire lower line was in use by the contractor transporting construction materials (R. 224, 226). The entire line was under construction, and in possession of plaintiff under contract to construct it.

DEFENDANT'S RECORD INSUFFICIENT TO GO BACK OF COURT'S FINDINGS

Defendant-appellant has presented twenty-six assignments of error. They constitute multiple efforts to assign a limited number of assertions of error. As noted later, we think defendant failed to preserve a record sufficient to present any of the asserted errors.

Assignments I to XIV, inclusive, (R. 346-360) deal with the commercial (log) haul, contending the trial court erred in refusing requests to make evidentiary findings and erred in findings and conclusions made.

Assignments XV to XXV, inclusive, (R. 360-367) challenge the refusal to make requested evidentiary findings and assert error in the findings and conclusions made with respect of the material haul.

Assignment XXVI (R. 367) refers to a finding not mentioned in the bill of exceptions and will not be further mentioned here.

Defendant admits on brief that the findings involve the construction of a contract and the intention and interpretation thereof by the parties (Brief, pp. 33-39). In addition to the argument of appellant, we suggest:

(a) As to the log (commercial) haul the court had before it evidence

(1) That the probability of such haul was indicated by defendant when inviting bids (R. 218, 225);

(2) That plaintiff reduced its hard rock bid on this information, expecting to make it up on the commercial haul (R. 218);

(3) That defendant asked plaintiff's permission to take the log haul long before it could naturally come up (R. 211);

(4) That defendant's chief engineer endeavored to coerce plaintiff's consent to give up the log haul (R. 195, 234);

(5) That plaintiff did not consent to give up the log haul and thereafter defendant referred to the money plaintiff would make on the log haul (R. 200, 215-216);

(6) That plaintiff prepared to conduct the log haul (R. 201, 224);

(7) That defendant hauled some right of way logs and on complaint of plaintiff defendant desisted and furnished an accounting (R. 217, 227) and thereafter plaintiff did the hauling (R. 249);

(8) That until the "Stop Work" order (the defendant took from plaintiff an uncompleted part of the road to get the log traffic) plaintiff hauled the logs (R. 201) and was paid at the commercial haul rate (R. 209);

(9) That defendant made a final effort to get the log haul (R. 200) and finally stopped work on a part of the uncompleted railroad to get the log haul (R. 205);

(10) The court also had to determine whether the log haul was commercial business.

(b) With respect of the use of the "Stop Work" clause of the contract, the court had before it not only the language of the contract but also evidence of the bad faith of defendant and its misuse of the clause.

(c) With respect of the price for hauling bridge supplies (material haul) the court's findings again involved facts. There was evidence indicating

(1) That when the bids were under consideration, defendant, with consent of plaintiff, eliminated all reference to "team haul" in the stipulated prices for this work and substituted therefor "hauling" so the contract prices would cover hauling by every means (R. 261);

(2) That although now claiming that bridge timber hauled by rail should take only the commercial haul rate, the chief engineer of defendant when computing the several bids included nothing under the commercial haul item for hauling bridge materials although he knew there would be a substantial amount (R. 268).

(d) With respect of the claimed arbitration of the price for the material haul, the court had before it not only the right to include this question of law in any submission to the engineer, but also whether there was in fact a submission and the bad faith of the engineer. There was evidence indicating (1) that the engineer himself raised the material haul price before there was any controversy and announced a decision arbitrarily and without hearing or opportunity for hearing (R. 234); (2) coupling his announcement with intimidation through threat of his power as chief engineer in charge of construction for defendant (R. 195).

We suggest that defendant-appellant's record presents to this court only the question of whether the findings made by the court support the judgment entered; that this court must accept the trial court's findings as the facts.

(1) The case involves four claims or causes of action in one statement. Defendant did not move the court for a general or special finding in its favor on the whole or any part of the case on the ground that there was no substantial evidence to sustain any other conclusion. In the absence of such motion the appellate court accepts the

facts found by the trial court and looks merely to see if they support the judgment.

O'Brien, Manual Federal Procedure, 1937 Supp. P. 10-11.

Dangberg v. Day (1918), 247 Fed. 477, 478 (9th CCA).

Macomber v. Goldthwaite (1927), 22 F. (2d) 638, 640 (9th CCA).

Gillespie v. Hongkong & Shanghai Banking Corp. (1927), 23 F. (2d) 670, 671 (9th CCA).

Pabst Brewing Co. v. E. Clemens Horst Co. (1920), 264 Fed. 909, 911 (9th CCA).

Denver Live Stock Commission Co. v. Lee (1927), 20 F. (2d) 531, 532 (8th CCA).

Wear v. Imperial Window Glass Co. (1915), 224 Fed. 60, 63 (8th CCA).

White v. U. S. (1931), 48 F. (2d) 178, 181 (10th CCA).

Pabst Brewing Co. v. E. Clemens Horst Co. (1920), 264 Fed. 909, 911 (9th CCA).
(Middle p. 911)

"In *Dangberg Land & Live Stock Co. v. Day,* 247 Fed. 477, 159 CCA 531, where a jury trial was waived and special findings of fact were made in favor of the defendants, and where at the close of the testimony plaintiff in error made no request for a finding in its favor on the issues, and made no motion or request presenting to the trial court the question of law whether there was substantial evidence to sustain findings for the defendant, this court held that the sufficiency of the evidence to support the findings was not open to review in the Court of Appeals. Such is the general rule of decision."

Denver Live Stock Commission Co. v. Lee (1927), 20 F. (2d) 531, 532 (8th CCA).

Reaffirming the rule clearly stated in the earlier case of *Allen v. Cartan & Jeffrey Co.* (1925), 7 F. (2d) 21 (a

case which the Ninth Circuit Court of Appeals cited with approval in *Macomber v. Goldthwaite,* supra), the court quoted the following from the Allen case with the italics as here used:

(Middle first column, p. 532

"The question of the sufficiency of the evidence to sustain the finding and judgment 'is reviewable only when a request has been made to the trial court, before the close of the trial, that it adjudge, *on the specific ground that there was no substantial evidence to sustain any other conclusion, either all the issues or some specific issue in favor of the requesting party'.*"

Wear v. Imperial Window Glass Co. (1915), 224 Fed. 60, 63 (8th CCA).

Referring to a trial court's findings where a jury is waived, the court said:

(Top page 63)

"It is, like the verdict of a jury, assailable only on the ground that there was no substantial evidence in support of it, and then it is reviewable only when a request has been made to the trial court before the close of the trial that it adjudge, on the specific ground that there was no substantial evidence to sustain any other conclusion, either all the issues or some specific issue in favor of the requesting party."

(2) No error can be successfully assigned for refusal of the trial court to make special findings. It is discretionary in the court to make special or general findings, and if it elects to make special findings but does not adopt those requested, that also is immaterial. Only by a motion for a finding on the whole or some phase of the case on the stated ground that the evidence will sustain no other conclusion can appellant preserve any other question than those which appear on the primary record.

Henry H. Cross Co. v. Texhoma Oil & Refining Co. (1929), 32 F. (2d) 442, 445 (8th CCA).
Babbitt Bros. Trading Co. v. New Home Sewing Machine Co. (1932), 62 F. (2d) 530, 536 (9th CCA).
Lahman v. Burnes Nat. Bank (1927), 20 F. (2d) 897, 898 (8th CCA).

(3) Requests for evidentiary findings or findings with respect of probative facts present no question on appeal. Ultimate facts only should be found.

Tricou v. Helvering (1933), 68 F. (2d) 280, 283 (9th CCA).
Becker v. Evens & Howard Sewer Pipe Co. (1934), 70 F. (2d) 596, 598 (8th CCA).
Anglo-American Land etc. Co. v. Lombard (1904), 132 Fed. 721, 734 (8th CCA).

(4) Defendant-appellant failed to advise the trial court of any ground or reason for any exception reserved, whether to the refusal to make requested findings, or to the findings made by the court. An exception to a finding made by the court, like an exception to instruction given to a jury, must state the reason therefor so the trial court may correct the error if the exception is deemed meritorious.

Macomber v. Goldthwaite (1927), 22 F. (2d) 638, 640 (9th CCA).
Webb v. National Bank of Republic (1906), 146 Fed. 717, 718 (8th CCA).
Wear v. Imperial Window Glass Co. (1915), 224 Fed. 60, 63 (8th CCA).

Macomber v. Goldthwaite (1927), 22 F. (2d) 638, 640, (9th CCA).

(First column, page 640)

"But, of the matters included in the assignments, few are before us for review, for it is thoroughly well established that, where a jury is waived and trial is had to the

court and special findings are made, in the absence of a request for special findings of fact and of exceptions reserved, based on the ground that special findings *made by the court* have no evidence to support them, and of exceptions to the conclusions of law drawn by the court from the facts found, the appellate court cannot review the decision of the trial court upon the merits." (Italics ours.)

Webb v. National Bank of Republic (1906), 146 Fed. 717, 718 (8th CCA).

(Middle page 718)

"The purpose and office of an exception is to sharply call the attention of the trial court and of opposing counsel at the time to the specific ruling or finding challenged to the end that the court may at once correct it, if it is erroneous. An exception which does not give this notice of the specific error claimed utterly fails to perform its function and is futile. * * * The court and opposing counsel would have been aware that the plaintiffs were of the opinion that the finding and the judgment against them were erroneous if no exception whatever had been taken, and the exception here under discussion gave them no more information."

Wear v. Imperial Window Glass Co. (1915), 224 Fed. 60, 63 (8th CCA).

Of the necessity of stating reasons for exceptions to the court's findings the cited case said:

(Bottom page 63)

"There is another reason why no reviewable question of law is presented to this court in this case. A trial court is entitled to a clear specification by exception of any ruling or rulings which a party challenges and desires to review, to the end that the trial court itself may correct them if so advised, and, if it fails to do so, that

there may be a clear record of the rulings and the challenges thereof. For this purpose a rule has been firmly established that an exception to any ruling which counsel desire to review, which sharply calls the attention of the trial court to the specific error alleged, is indispensable to the review of such a ruling."

We direct attention to the findings requested by defendant, to those made by the court and the exception thereto. The findings requested by defendant and refused by the court respecting the log haul are three in number, XV (R. 179), XVI (R. 180) and XVII (R. 181). Each is evidentiary and not of the ultimate fact. These are the only requested findings involved in assignments of error I to XIV, inclusive.

To the special findings made by the court and challenged in these assignments no sufficient exception was reserved. The findings thus challenged are XV (R. 164) and XVIII (R. 169). Finding XV is mentioned in assignments I (R. 347), II (R. 347), V (R. 349) and VI (R. 349). Finding XVIII is mentioned in assignments IV (R. 348) and V (R. 349). Exception to finding XV is at page 189 of the record. It states no reason for the exception. We find in defendant's bill of exceptions no exception to finding XVIII.

A reference to the findings requested and refused respecting the material haul discloses that there are two requests, XVIII (R. 251) and XIX (R. 252). Both are evidentiary. The exceptions are insufficient. (R. 252, 253.)

The special findings of the court respecting this haul that are made the basis of assignments are finding XIX (R. 170) and XX (R. 171). Finding XIX is mentioned in assignments XV (R. 360) and XVIII (R. 362). Finding XX is mentioned in assignments XVI (R. 361), XVII (R. 361 and XIX (R. 363).

The exception to finding XIX is at page 256 of the record, that to finding XX at page 257. The parts of these findings excepted to are designated but the court is not given any further information or reason for the exception.

Where questions of fact are involved proper findings must be requested and proper exceptions reserved to the findings made by the court to present any question other than the propriety of the conclusions from the findings made.

Clearly the findings do support the judgment. Defendant-appellant challenges the judgment in two respects: (1) Awarding a recovery on the commercial haul; and (2) Awarding a recovery on the material haul.

In finding XV (R. 164), at page 168, the court finds the log haul was commercial business, that plaintiff was entitled to conduct it, that plaintiff had been conducting it (R. 165) until defendant took portions of the road under a misuse of the "Stop Work" clause of the contract (R. 166) at a time when the portion taken was not completed, and defendant itself finished the work; that defendant was progressing satisfactorily with its contract (R. 168) and the taking was in bad faith to acquire the log haul and deprive plaintiff thereof.

Finding XIX (R. 170) fully covers the material haul and Finding XX (R. 171) forecloses a claim of umpire decision. The court finds adversely to estoppel or waiver.

Without an adequate exception to the facts found by the court, the only question is whether they support the conclusions drawn therefrom and resulting judgment. Reserving our objections to the adequacy of defendant's record to present the questions argued in its brief, we discuss those questions.

THE COMMERCIAL HAUL

Defendant divides its argument re commercial haul into three parts, (1) that the contract does not obligate plain-

tiff to conduct that haul during construction, (2) that, if it does, defendant could defeat the right by taking over an uncompleted part of the road under construction, and (3) if it does, defendant could defeat the right by simply taking over the haul itself under a claim of change of work.

I.

Defendant encountered some difficulty in presenting its argument as to the meaning of the contract covering the commercial haul, and its meaning covering the material haul. As to the commercial haul, defendant contends for an interpretation by the "contract proper" (first portion) as distinguished from the entire contract (appellant's brief, p. 28), but when discussion of the material haul is reached, consideration of the entire contract is urged (Brief, p. 58). The latter position is correct. For convenience, the contract was subdivided, but it is entire, each division being a part of the whole by express provision. The first statement, after the introductory clause, refers to "the specifications hereto annexed and *made a part of this contract.*" (R. 52.)

If the contract specifically requires that the contractor conduct the commercial haul while the road is under construction, we think there will be no question of the *right* of the contractor to perform. We think the language of the contract in this respect is clear:

> "Contractor shall handle with his own work train, prior to date line is turned over to operating department of the company, all commercial business, material and empty cars of the company used in commercial service and in the service of other contractors." (R. 123.)

That is, the contractor as a part of its construction contract is to (1) conduct all commercial business, (2) handle material and empty cars of the company used in commercial service, and (3) handle such cars used in the service of

other contractors. The trial court thought the contract clearly included the duty and right to conduct this haul. (R. 335-336.) If there is room for construction, based upon other provisions of the contract, and the conduct of the parties, we submit the same conclusion must result.

We think this is not the usual railroad construction contract, but in some respects very unusual. Bidders were advised that logs would be ready to haul early in 1927, and that the road would be expected to haul logs while under construction—after June 1, 1927. (R. 225.) The terms of the contract must be considered in the light of this information. Clearly it was the intention that the contractor alone could operate over the railroad while under construction and until turned over to the operating department of defendant.

Certainly the defendant could reserve the right to operate over the line, if it could find a contractor who would undertake the work subject to the inconveniences that would be caused by trains under control of another. Just as certainly, if this was intended, a simple clause reserving this right and subjecting the contractor to these burdens should and would have been in the contract. No such right is reserved. The only right reserved in defendant respecting train operation is for ballast trains under specified restrictions. (R. 122.) Such specific reservation cogently denies greater rights in defendant.

The contract throughout manifests intention to place the road in control of the contractor during construction, with all obligations flowing therefrom.

The contractor must keep open and safe all private road crossings (R. 53) and can not employ any men who have been discharged from other work of defendant for named reasons (R. 55); the contractor must haul all materials to be used in the construction work (R. 59-60); the haul to be from a point on defendant's operating railway system (R. 66). The only provision in the contract for defendant to take over the road or any part thereof authorized this

action if the contractor refuses to perform the contract (R. 69). The contractor is made liable for all damages by fire started from the right of way, something inconsistent with operation of trains by another (R. 70); and is required to keep all buildings and structures insured "until completion and acceptance by the company" (R. 71); materials to be used by the contractor are to be delivered by defendant on a siding at its operated line (R. 97); the contractor is to align and ballast the road, and after the road is completed and settled under traffic a second adjustment is to be made. Not until all of this has been done will the road be accepted (R. 131); plaintiff's conduct of the commercial haul includes return of loaded cars "to the operated lines" of the company (R. 123); contractor shall handle material from defendant's operated line to material yards (R. 124). Equipment for these operations (exclusive of motor power) is to be furnished by defendant at a rental (R. 109).

We submit these stipulations do not leave to defendant one single operation of a train over this road until construction is completed, except for ballast; that this careful limiting of engine and car service by defendant to hauling ballast, coupled with like careful placing of every other burden of operation on the contractor forces the conclusion that the contractor was to operate the road and move such logs as were to be hauled before the completed road was delivered to defendant's operating department.

Defendant drew the contract (R. 192). If construction is necessary it will be construed against defendant.

> *Sartoris v. Utah Const. Co.* (1927), 21 F. (2d) 1 (9th CCA).

That is the contract. It adds nothing to the argument to say that defendant acted foolishly in making it, or that the profit accruing to the contractor from the log haul is

large. Manifestly defendant underestimated the volume of commercial business, just as it underestimated the size of the entire job.

Defendant (Brief, p. 18) opens its discussion of the contract with the misleading statement that plaintiff asserts the right "to take and retain" possession of a railroad to be built "against the wish of the owner." This reverses the real position of the parties. Possession of the right of way was delivered to plaintiff by the contract—had to be delivered if the contract was to be performed—and defendant took from plaintiff an uncompleted part of the road in order to deprive plaintiff of the commercial haul, which was a part of the contract, at the same time ordering plaintiff to continue work on the remainder of the road. As we have noted above, the contract obligated plaintiff not only to construct, but to operate the line until construction was completed.

Plaintiff, under this contract, had possession of the road during construction, with the liabilities accompanying such possession.

Kansas Central Railway Company v. Fitzimmons (1877), 18 Kan. 34.

The court here had to determine liability between owner and contractor for a personal injury suffered upon an attractive nuisance. The contractor was operating during construction. Placing liability on the contractor, the court said, referring to the road:

(middle p. 39)

> "During its construction it was properly in the charge of and under the control of the corporation having the contract for its construction * * *."

A construction contract implies right of possession in the contractor.

> *Williston on Contracts*, Sec. 1293 and Sec. 1318.
> *Weeks v. Rector of Trinity Church* (1900), 67 N.Y.S. 670, 672.

Such contract creates a relation akin to landlord and tenant (*Fiske v. Framingham Mfg. Co.* (1833), 14 Pick. (Mass.) 491, 493) and with the possession thus created, the landlord has no right to interfere.

> *Harris v. Keehn* (1919), 25 N. Mex. 447, 184 Pac. 527, 7 A.L.R. 1099, 1102.

Conduct of the parties is convincing that the trial court correctly construed the contract re log haul.

In soliciting bids defendant advised plaintiff there would be a log haul early in 1927; the Clearwater Timber Company expected to have its mill ready then and the road was to be ready to move logs concurrently; therefore rails were to be laid by June 1. (R. 225.) In view of the requirement in the proposal that all commercial business be conducted by contractor, this was a plain invitation to weigh the prospect of a log haul as soon as rail was laid. Otherwise, there was no reason to mention the haul. Defendant could stipulate time limits without mentioning the prospective haul.

The information had the effect apparently intended. Plaintiff reduced its hard rock bid from $1.07 per cubic yard to 99 cents. This made an estimated difference of $60,000 in the bid, which plaintiff hoped to recover on the log haul (R. 218).

Defendant charged no rental for cars used in commercial business (R. 212, 249).

Under date of August 3, 1926, defendant wrote asking plaintiff's permission to take over the *operation* of the line June 1, 1927, when the log haul would be ready (R. 211). It is important to note that there was no information to

plaintiff of purpose or decision, as stated on appellant's brief (see pp. 19-20, 35). The letter of defendant is illuminative. It discloses (1) that log movement was to begin at the very time indicated in the invitation to bid; (2) that defendant recognized the right given plaintiff by the contract to operate the line, and (3) that thus early (ten months before the log haul would be ready) defendant was asking plaintiff's consent to give up the log haul. In this connection we note that defendant did not then contend for a right it claimed, but, as stated by the chief engineer, wrote the letter of August 3 to develop what plaintiff's attitude would be (R. 232). Quite unnecessary, if defendant had a right to operate the road. We accept the concession that in August, 1926, defendant for the first time determined that it would haul the logs—an admission that when the contract was written and thereafter until the volume of the prospective haul became apparent both parties understood conduct of the commercial haul by plaintiff was one of the provisions of the contract.

Some days later when Mr. Twohy was in St. Paul on other business with defendant, the latter raised the question of log haul. Mr. Twohy was not on the construction job, although he visited Orofino frequently, and was there a couple of days after the Orofino office received the letter of August 3. He was on other business, and did not see the letter, and knew nothing of it until defendant opened the subject in St. Paul. At that time Mr. Twohy told defendant he knew nothing about the letter, and did not carry in his mind the terms of the construction contract, but whatever it provided would be satisfactory. This was the natural and proper answer under the circumstances. It was all any chief engineer could ask for if the contract gave defendant the rights now claimed. The answer of the chief engineer discloses a realization that the contract does give the plaintiff the commercial haul, and a determination to coerce plaintiff. He threatened use of his power as chief engineer—a power to destroy (R. 195, 212).

Mr. Stevens admits the accuracy of Mr. Twohy's testimony (R. 234).

On the train enroute west from St. Paul, Mr. Twohy was so alarmed by the threats of the chief engineer that he wrote the letter Ex. 32 (R. 196). It falls far short of a consent to an amendment of the construction contract. In it Mr. Twohy reserved his contractual rights, including price (R. 197). The most that can be claimed for it is that Mr. Twohy personally renewed his assent that the chief engineer is the umpire. We are not now discussing this letter as a claimed arbitration—that claim has been abandoned as to the log haul—but are discussing it as one of the facts to be considered in interpreting the construction contract. There is evidence that this St. Paul meeting was not treated by either party as decisive of the log haul right. In November, 1926, after the St. Paul meeting, Mr. Twohy and Mr. Boss were in the office of the chief engineer complaining of bridge troubles when the latter said "those fellows may make a whole lot of money" and Mr. Twohy responded that the chief engineer was probably referring to the log haul, but that was months off and the men would sink before then (R. 200). Mr. Boss thought the chief engineer made the statement re log haul (R. 215). The difference in recollection is a badge of truth. Later, in December, the chief engineer again referred to the log haul as a means of pulling plaintiff out of the hole (R. 216).

Plaintiff in fact conducted the log haul and all other commercial business until the wrongful taking of an uncompleted part of the road (R. 201, 209, 241).

The evidence is convincing that the minds of the parties met on the commercial haul, as found by the court, when the contract was made—denial by defendant came with realization of the volume of commercial business. It was so found by both the auditor and the court (R. 329).

Argument beginning at page 26 of appellant's brief that plaintiff's obligation was to conduct commercial business

until the track was acceptable to defendant has too many facts to overcome: (1) The court found the portion taken over was not completed, was not acceptable to defendant in its then condition because defendant continued the work plaintiff was doing, and was taken in bad faith to get the log haul (R. 168); (2) The contract is a unit to construct a road from Orofino to Headquarters, indeed that was one of the reasons assigned by the court for ruling out the construction claim (R. 160); (3) The entire contract negatives any right in defendant to take the road piecemeal; (4) Track work was not completed (R. 168) and work train service was continuing over the line taken by defendant (R. 224, 226). We think it unsound to argue that the right to the commercial haul was limited to the period of work train service and therefore defendant could terminate the right to the commercial haul by wrongfully terminating work train service.

The argument (Ap. Brief pp. 30-33) that defendant could demand less than full performance by plaintiff is beside the point. Could defendant take from plaintiff a part of its contract during satisfactory performance thereof, in order to deprive plaintiff of a profitable portion of its work, with resultant gain to defendant? If there is any virtue in contracts the answer must be negative. No amount of argument as to willingness of defendant to accept less than full performance can wipe out the court's finding (amply supported by evidence) of a taking in bad faith, before completion, of a part only of the road in order to deprive plaintiff of the commercial haul. There is no question of the obligation of defendant to *demand* anything—there is question of the right of defendant to take from plaintiff a portion of its contract.

At page 37 of its brief, defendant notes that when the supplemental contract was made in April, 1927, plaintiff failed to suggest that it "had been deprived or was about to be deprived" of the commercial haul. True, and convincing evidence that plaintiff had not yet been deprived of that

work, and did not know it "was about to be" so wronged. In view of the conversations between the parties in November and December, 1926 (this brief p. 18) we submit the absence of discussion of the commercial haul at the April, 1927, meeting confirms the position of plaintiff. It had been conducting such commercial hauling as developed. The log haul in quantity was in the future. It certainly did not know it was "about to be deprived" of that haul. There was no occasion to demand or claim that which the contract provided.

The so-called appeals for aid were in fact appeals for a right. Plaintiff had been short-estimated on its monthly accounts a large amount (R. 229-230); allowances in cash were for moving materials not named in the contract (R. 238, 242, 250) and for placing hewed timbers for which no price was fixed (R. 243). These claims had been frequently presented, and the chief engineer refused to pass on them.

We submit the contract expressly makes conduct of the commercial haul a part of plaintiff's duties and rights; that, if the contract is subject to construction, the conduct of the parties establishes an intention that the contractor should handle the commercial business until the road was completed.

II.

(a) The next contention of defendant re commercial haul is that even if the contract by its own terms or as interpreted by the parties gave to plaintiff the right to conduct the commercial haul until the road was completed, nevertheless by virtue of what is known as the "stop work" clause the defendant could do what it did. The full extent of the contention is reached on page 44 of appellant's brief where it is insisted that under the "stop work" clause defendant could take any part of the work away from plaintiff even though covered by its contract, and "make any substitute arrangement desired for the completion of the work."

The finding of the court is that when defendant took portions of the road from plaintiff the work required of plaintiff under its contract was not finished, plaintiff was progressing satisfactorily with it and the defendant did not in good faith intend to stop work, but took that portion of the uncompleted road from plaintiff in bad faith in order to obtain the profits of the commercial haul and deprive plaintiff thereof (R. 168).

It is important to bear in mind that work on this portion of the road was not stopped. It was taken from plaintiff in an uncompleted state and defendant itself finished the work.

We further note that the very order to stop work required plaintiff to continue work on other portions of the line (R. 165).

Other provisions of the contract indicate under what circumstances defendant was authorized to take over the work or any part thereof without stopping work. This right is confined to two situations, (1) where work is not progressing as fast as necessary, in which event defendant *may terminate the contract* and complete the work at the cost of the contractor (R. 68), and (2) where the contractor fails to perform its agreements set forth in the contract, in which event again the company may cancel the contract, take possession of and hold the road and materials and complete the work (R. 69). The stop work clause is intended for a very different purpose. It is to meet a situation where some unexpected happening makes it advisable to *cease* work. As stated in

Warren-Scharf Asphalt Paving Co. v. Laclede Const. Co. (1901), 111 Fed. 695 (8th CCA)

near the bottom of page 696:

"Such stipulations are sometimes found in contracts for the construction of railroads, and for the doing of

other work of like character where unforeseen events may occur to render a temporary or permanent suspension of work both desirable and necessary."

This does not deal with the taking of work from one person and giving it to another. It is made to meet situations that destroy the feasibility of the road, such as a road projected into a remote heavily timbered area and while the road is under construction the timber is destroyed by fire, or the financing for a railroad should fail so that payment for the construction became impossible. Many illustrations of like nature could be given. No such situation existed in the case at bar. The stop work clause was not used to stop the work in whole or in part. Indeed, the contractor was required to continue the work, not taken over by the defendant. The stop work clause was used as a vehicle to enable defendant to accomplish that which it had no right to do under the contract. It was used for the naked purpose of depriving plaintiff of the profits to accrue under the commercial haul provision of the contract and gaining for defendant both the profits of the haul and the saving effected by withholding from the contractor the remuneration which the contract provided for that haul. We submit the stop work provision can not be so used. We think that, under such provisions as this, defendant could not stop work on the first part of the road while demanding that the contractor complete work on the remainder of the road, and could not stop work at all without abandoning further construction, and certainly could not stop the contractor from doing a part of the work without in fact stopping the work, but in fact the company supplanting the contractor on the portion of the work thus stopped.

There has not been a great deal of law written on this particular subject. We assume the stop work clause has

not frequently been abused. We call attention to the fact that in the case of

Warren-Scharf Asphalt Paving Co. v. Laclede Const. Co. (1901), 111 Fed. 695 (8th CCA)

construction was actually stopped and the contractor was endeavoring to obtain anticipated profits. It was not a case in which the company undertook to supplant the contractor.

All of the cases we have been able to find require that the utmost good faith shall be exercised in the use of this clause.

Wortman v. Montana Cent. Ry. Co. (1899), 22 Mont. 266, 56 Pac. 316, 320.

In this case a railway company stopped work under a clause which permitted it to do so (top second column, Pac. p. 318) "whenever, in the opinion of the party of the first part, it may be necessary to stop any of the work," the right to determine upon such necessity being vested in the chief engineer. The contractor alleged that work was only suspended temporarily and not stopped, and therefore it should have been permitted to complete the work at some future time, but the fact was developed (middle second column, Pac. p. 319) that no work was done after the stop work order, except some necessary protection work, which the contractor was permitted to do. The court held that the railroad company was within its rights in stopping work. Of the necessity of exercising good faith, the court said (bottom first column, Pac. p. 320):

> "while the chief engineer is named as the arbitrator whose judgment should determine that an exigency had arisen justifying the termination of the contract, yet it is clearly implied that this judgment should be exercised in good faith."

Louisville, E. & St. L. Ry. Co. v. Donnegan (1887), 111 Ind. 179, 12 N. E. 153, 157.

In this case the contract reserved in the company the right to cancel upon thirty days notice if the work was not being prosecuted properly. The company's engineer delayed the work and then took it over and prosecuted the same to completion. In holding the taking unjustified, the court said (bottom p. 157, of N. E.)

> "Those provisions of the contract must be given a reasonable construction. It certainly was not intended by the parties that the engineer in charge should arbitrarily, at any time, and without any sort or shadow of reason, take the work out of the control of appellees, and employ men at his pleasure."

The finding of the court in the case at bar that the taking was in bad faith for the purpose of depriving plaintiff of the log haul has support in statements of defendant's chief engineer. Prior to serving the stop work order he stated to Mr. Twohy that he was going to take the log haul (R. 200). That was the sole purpose of taking over this piece of road.

The proper application of such a stop work clause as this was determined squarely by the Supreme Court of Idaho.

Molyneux v. Twin Falls Canal Co. (1934), 54 Ida. 619, 35 P. (2d) 651, 655.

The contract, in this case to drive a tunnel, left to the employer the determination of the depth to which the tunnel should go, which was estimated at 2,000 feet, but it was to be driven until a satisfactory flow of water was obtained. Plaintiff received the contract to drive the tunnel, but when it proved profitable the employer stopped the work and then proceeded to finish it itself. The same defenses were offered there that are offered here by de-

fendant. The court construed the reservation of judgment as to depth of tunnel as one requiring the employer to permit the contractor to drill the tunnel to such depth as it was to be drilled. We quote (middle first column, Pac. p. 655):

> "If, at the time appellant ordered respondent to stop work, it intended to drill the tunnel any additional length and then or later should proceed with the tunnel without having previously in good faith and pursuant to the contract determined to terminate the tunnel, it was obligated to let the respondent do the work, and if it did not permit respondent to do such work appellant would, in such case, have breached its contract with respondent."

Appellant in the case at bar on brief asserts that this case is not in point because it did not deal with a stop work order in express terms. In this counsel is mistaken. The plaintiff in the Molyneux case pleaded an amendment to the contract by which it reserved the right to stop work at will. Of this contention the court said (middle second column, Pac. p. 655):

> "In respect to the allegation to the effect that the contract was modified to mean that work on the tunnel might be stopped by appellant at any time, we are again confronted with the conclusion heretofore expressed. It is not apparent that such a modification of the contract would authorize a termination of the contract until appellant had in good faith determined to terminate the tunnel."

The case is clear authority for the proposition that the stop work order means to stop work in good faith without intention of completing the work, and that it can not be used as a means of taking the work from the contractor and giving it to another.

The lower court clearly stated the meaning of the stop work clause, and that it would not cover situations where work was not in fact stopped, but the clause was used to deprive the contractor of a part of his work (R. 336). No authority is cited on appellant's brief on this point that deals with a situation where work was not stopped, but was taken from the contractor for another. We have cited on this brief all of the cases we have been able to find, and each of them denies the right to take possession of any part of the work and exclude the contractor therefrom, without in fact stopping the work or intending to stop the work. All of the cases recognize the office of a stop work clause. It is not to be used as it was used by the defendant in the case at bar.

A further provision of the contract negatives good faith use of the "stop work" clause. The contract requires a final estimate and payment for any work that is totally suspended (R. 70). No such estimate was made or tendered for the portions of the road taken. "Stop work" was but a means of acquiring the commercial haul.

(b) A second subdivision of defendant's argument on construction of the contract (pp. 48-56, Appellant's Brief) contends that plaintiff's right to conduct the commercial haul was limited to such business as defendant might accept, that defendant would not have accepted any of the log haul if it could not haul the logs itself, and that the contract lacks mutuality in that it was only a contract to haul such commercial business as the defendant might see fit to permit plaintiff to haul.

Defendant's argument is premised upon the proposition asserted on brief that there was no commitment by defendant to the Clearwater Timber Company to haul any logs at any given time. We think this statement is not justified. True, it was so asserted by Mr. Stevens, but there is evidence abundantly supporting a commitment. The contract between deefndant and Clearwater Timber Company, which was financially interested in construction

of the road, contemplated the hauling of logs during construction (R. 233). The letter of Mr. Stevens of August 3, 1926, admits that then, ten months before the log haul was due, he advised the Weyerhaeuser people (Clearwater) that the road would be ready to handle logs June 1, 1927 (R. 211). Many million feet of logs worth $10.00 per thousand were banked along the right of way by the Clearwater people in reliance on this assurance from defendant. The damage would be heavy if these logs were not moved during the year 1927 (Finding XV; R. 165, R. 243). Logs left in the woods during the first winter following the cutting suffer heavy deterioration (R. 249). We think there is ample support for the statement that there was a commitment to move these logs beginning June 1, 1927.

Now, the argument of defendant that it would not have received any logs for transportation if the transportation was to be handled by plaintiff under its contract, approaches too nearly a bad faith admission. It would involve (1) a confession that its obligation, moral, at least, to move these logs for the Clearwater Company before they were damaged would not be performed, and (2) a confession that its obligation to permit plaintiff to conduct the commercial haul during construction would not be carried out in good faith even though the commercial haul tendered to defendant was of the type it had at least morally committed itself to accept.

Defendant argues that the measure of damages adopted by the court can not be accepted because the court can not find that defendant would have accepted these logs to haul if plaintiff was to do the hauling. This quite overlooks the terms of the contract. The obligation of defendant was to permit plaintiff to conduct such hauling as was conducted, and defendant hauled many thousand car miles of logs. It can not be excused from its obligation because it failed to convince either plaintiff or the court that its construction of the contract is correct. The contract is not that

plaintiff may haul such logs as defendant sees fit to permit plaintiff to haul. The contract is that plaintiff shall be permitted to conduct all commercial hauling that is conducted over the line until the road is completed. That difference in contract is the difference between an illusory contract, or one lacking mutuality, and the contract between plaintiff and defendant. A contract where one party agrees to sell to another the production of his mine, or of his oil well, or to supply his necessities, or to conduct all hauling that may be conducted in a particular locality, does not lack mutuality, but entitles the other party to have all ore that is produced, or all oil that is produced, or to conduct all hauling that goes over the line. This court and other federal courts have had occasion to pass upon the question many times, and uniformly have ruled that a contract like that under consideration requires (1) perfect good faith in conducting the business, the product of which is to be sold to or handled by another, and (2) the delivery or permitting of the service by the other to the exclusion of all other persons.

Miller v. Robertson (1924), 266 U. S. 243, 252, 69 L. ed. 265, 272.
Great Lakes & St. Lawrence Transp. Co. v. Scranton Coal Co. (1917), 239 Fed. 603, 606 (7th CCA).
T. W. Jenkins & Co. v. Anaheim Sugar Co. (1918), 247 Fed. 958, 960 (9th CCA).
Imperial Refining Co. v. Kanotex Refining Co. (1928), 29 F. (2d) 193, 195 (8th CCA).

All of the foregoing cases discuss the question of mutuality and point to the distinction which clearly exists. The opinion in *Imperial Refining Co. v. Kanotex Refining Co., supra,* reviews many cases from the federal and state courts. Uniformly where the contract is that one party shall handle or purchase, etc., all of a certain article the other may produce, or that passes over the road, etc., it is held to be a valid and binding contract.

The case of *Dennis v. Slyfield* (1902), 117 Fed. 474 (6th CCA) illustrates the other kind of situation where the only agreement is that one party may carry such freight as the other party sees fit to give him. This is an illusory contract. It is not to be confused with a contract permitting one party to haul all freight that goes over the road during a stated period.

We have discussed defendant's argument regarding the measure of damages (Ap. B. Page 51), despite the fact there is nothing in the record to present it. As we noted early in this brief (page 10) defendant reserved no exception to finding XVIII (R. 169). In this finding, the court determined the measure and amount of damage for breach of contract regarding the commercial haul. Without an exception to this finding, we deem further discussion of this point a work of supererogation.

III.

Defendant's third position re commercial haul is that it had the right to take the log haul from plaintiff under the "change of work" provision of the contract. The argument is mixed with the argument on the stop work clause (Appellant's brief, p. 45), but involves an essentially different proposition. The provision of the contract relied upon reserves in the company the right "to change in whole or in part, as it may deem expedient, the line and grade of the railroad, or the amount of work embraced in this contract" (R. 72). This clause is common to construction contracts—more frequently found in contracts to construct buildings or structures than in contracts to build railroads. Its meaning is well known and has been defined by the courts. It permits a change in the plans and omission from the entire job of some particular specified work, etc., but does not permit the owner to take work away from the contractor and give it to another or perform the work itself. The first case of which we have

knowledge, construing a clause such as this, is *Clark v. Mayor of New York* (1850), 4 N. Y. 338.

A contract to construct an aqueduct permitted the employer to make alterations in the form, dimensions or materials of the work. Under the contract the employer permitted the contractor to perform the expensive part of a particular piece of work, and then took the work away when there was an inexpensive part left to finish that would prove profitable. Referring to the provisions for alterations, the court said (p. 342):

> "But this provision, although it gave the commissioners power to direct in good faith any change in the form or dimensions of the work, did not authorize them to stop the work in an unfinished state and thus arbitrarily annul the contract."

Shaver v. Murdock (1868), 36 Cal. 293, 297.

A contract to erect a building authorized the owner to make alterations, deviations or omissions. A part of the work by agreement was performed by another. The question involved was whether completion of that part of the work performed by the contractor prematurely shortened the time for lien claims. Rejecting proof of the meaning of "omissions" in contracts of this nature, i. e., that it does not mean "something which the owner may take off the contractor's hands and performed or finish for himself", the court said (top p. 297):

> "The terms of this subdivision of the original contract, when read in connection with other provisions of the same contract, are plain and simple, and the language, employed in its ordinary sense, most clearly leads to the construction claimed by plaintiff without the aid of extrinsic evidence; hence the rejection of evidence tending to explain the simple meaning of a term, or render more apparent the construction of a sentence which was already sufficiently clear, was not error."

Gallagher v. Hirsh (1899), 61 N. Y. S. 609, 613, 45 App. Div. 467.

Here a builder claimed the right to deduct from the contractor's remuneration money paid to another for a portion of the work included in the contract. Relying upon language like that found in the contract in the case at bar, in a clearly reasoned opinion, the court ruled a provision such as this did not permit the taking away from the contractor of work which was not omitted from the entire job. (Bottom p. 613, N. Y. S.):

> "The court charged the jury that the defendant had no right to take away any part of the plaintiff's contract, and give it to another without the plaintiff's consent. This, we think was a correct interpretation of the clause in question. It is evident that under the word 'omissions' were intended to be included those things which were abandoned and left out of the plaintiff's contract, and not such as were taken out of the plaintitff's contract, and given to another to be performed. The word 'omissions' did not mean omitted from the plaintiff's contract, but omitted from the work, and clearly could not be construed to have allowed the defendant to take two-thirds of the work from the plaintiff, and then compel him to perform the rest. The words are, 'additions or omissions from said contract,' evidently meaning additions to or omissions from the work to be done under said contract, which clearly negatives the idea that they were intended to mean that the defendant should have the right to omit the work from the plaintiff's contract, in order to give the contract to another to do the same thing."

Defendant on brief in this court has not cited a single authority to support its argument that a reserved right to change plans or change the contract or the work would give it the right to take work away from the plaintiff and per-

form the work itself,—to take work covered by the contract from plaintiff without eliminating it from the job. In the court below, however, counsel cited and relied upon a single decision which we shall refer to in order that we may have given the court all of the authority we have found upon the subject, and also in order that we may discuss this case while we have an opportunity:

Marsch v. Southern New Eng. R. Corp. (1918) 230 Mass. 483, 120 N. E. 120.

A number of separate actions against railroad companies which had organized a "paper railroad company" to construct a railroad for them, were involved in this one decision. The contract contained a provision giving the railroad company the same rights that are given by the provision of the contract under discussion in the case at bar. Plaintiff contended that certain work had been taken from it and given to another. Without any discussion of the law or citation of authority the Massachusetts court (N. E., p. 124) ruled that this provision of the contract would permit the railroad company to take the work from the contractor and give it to another. The ruling is in direct conflict with that in the cases cited above on this brief, which are reasoned. We submit that they correctly construe the language involved and that the Massachusetts decision should not be followed. We are strengthened in this view by the history of this litigation.

The case in 120 N. E. went up upon rulings on the pleadings. When the decision of the Massachusetts court was entered, plaintiff in that case immediately dismissed in the state court and instituted his action anew in the federal court. We know this because his right to discontinue was upheld (*Marsch v. Southern New Eng. R. Corp.* (1920) (Mass.) 126 N. E. 519). In the federal court Marsch recovered a judgment for upwards of $622,000, which was affirmed on appeal (*Southern New Eng. R. Corp. vs. Marsch* (1931) 45 F. (2) 766 (1st CCA). The

litigation next appears in a decision involving the receivership of the Southern New Eng. R. Corp. (*Central Vermont R. Co. v. Southern New Eng. R. Corp.* (1932) 1 F. Supp. 1004 (D. C. Mass.)). That case involved the right to fasten the liability of the judgment specifically referred to upon the railroad companies which organized the paper company. The court had occasion to refer to the decision in the state court which preceded the judgment in the federal court. The receivership decision was appealed, the opinion of the appellate court being reported as *Central Vermont R. Co. v. Marsch* (1932) 59 F. (2d) 59 (1st CCA). This case recites the history of the litigation to some extent, and notes (p. 60) that the original Marsch judgment in the federal court for upwards of $622,000 was rendered in June 1930, and affirmed in 45 F. (2) 766.

In view of the different result obtained in the federal court in the litigation between Marsch and the Southern New England Railroad Corporation, coupled with the lack of reasoning in the decision of the Massachusetts Supreme Court, we submit that the case of *Marsch v. Southern New Eng. R. Corp.* (1918) 230 Mass. 483, 120 N. E. 120, is not sound and should not be followed.

A contractual provision permitting the owner to change the plans or omit from the contract or the work, has a well recognized meaning that does not include taking work from the contractor without omitting the work. To permit that would permit destruction of all contractual rights under a construction contract.

THE BRIDGE MATERIAL HAUL

In appealing from the judgment of the lower court respecting the prices to be paid for hauling bridge materials, defendant has combined its discussion of the express language of the contract and the construction thereof by the parties (Brief, 57-64). In addition to contractual

construction, the contention is offered by defendant that the matter could be submitted to the chief engineer, that it was submitted, and a binding ruling made.

We believe it will aid the court to discuss the contract first upon its terms alone, and present a separate discussion of evidence aliunde the contract itself.

Defendant's entire argument with respect of the meaning of the contract on its face is premised upon the provision in the specification for bridge construction, limiting "team haul" to four miles (R. 108).

This is the only place in the entire contract where the words "team haul" appear. This is significant because this limitation in the manner of performing the physical work is claimed to affect the stipulated prices. This clause apparently has nothing to do with prices. It does not suggest that the prices fixed elsewhere in the contract shall be limited to team haul, or that the fact of hauling by team shall in any way affect the prices named. We think it deals with an entirely different subject. Speed of construction is written large on the contract, and manifested throughout its performance (R. 243). The material yard was located at Orofino on the operated line of defendant (R. 260). That it was to be located on the main line is clear from many of the contract provisions. The contract provides in all instances that materials furnished by the company shall be delivered on its operated line nearest the material yard. (R. 66, 97, 124). Therefore, when the contract was written, both parties knew that the plaintiff must haul the materials from the operated line to the point on the line under construction where such materials would be used. Limiting the team haul to four miles would compel laying of track from the lower end of the road as rapidly as grade was thrown up, thereby speeding delivery of materials for bridge building. This is, we submit, the only significance of the paragraph with respect of team haul.

Other provisions of the contract cogently sustain this proposition. Prices to be paid for work are all in one location in the contract.

"The prices to be paid by the Company for the work are as follows:" (R. 56).

* * *

"Hauling for concrete pipe, per ton per mile... 0.65
Hauling for corrugated iron pipe, per ton per mile 0.85
Hauling piles furnished by the Company, per lineal foot per mile 0.02
Hauling timber furnished by the Company, per thousand, F.B.M., per mile 0.85
Hauling metal fastenings, per ton per mile.... 0.65" (R. 59-60).

These are the prices and the only prices named in the contract for this hauling, which was known when the contract was written to be from the operated line of defendant to the point where the materials would be used. These prices apply only to materials furnished by the company, excluding local timbers, piles, etc., obtained on the ground, which is covered by separate items. Metal fastenings are to be furnished by the company (R. 58), and corrugated pipe is to be furnished by the company (R. 59). Indeed, all material entering into permanent construction of the line was to be furnished by the company (R. 133). Defendant argues that plaintiff was not engaged to do hauling work (Brief 59), but this hauling was an essential part of the construction work. Plaintiff did not contract merely to throw up grade, lay rails and place bridge timbers delivered to them ready for erection, but its contract covered the moving of these materials from the operated line of the company. These materials were not commercial business. We would think the term "commercial business" is sufficiently clear without extrinsic evidence. With respect of transportation, it is business produced by others against whom a charge can be made. The hauling here

involved, however, consists of the very materials covered by the construction contract, produced, not by others, but by the defendant, a party to the contract, and its hauling was a part of the construction. Indeed, we think the language of the contract excludes this material haul from Item 72 upon which defendant relies. Item 72 fixes a price for hauling commercial business, material and empty cars of the company *used in commercial service* and in the service of other contractors. (We note that the italcised words were eliminated on defendant's brief p. 59, in quoting this provision). This item by its very terms is limited to cars used in commercial service and in the service of other contractors (R. 63). The succeeding item 73 covers every other item of hauling, except the hauling of materials to be used by plaintiff in performing its contract. This item fixes a price of $10.00 per car for handling cars of material between the operated line and the material yard, *exclusive of the contractor's own material and that covered by the contract with defendant.* The contract between plaintiff and defendant clearly does include the hauling of bridge materials to be used in the contract and the only price specified therefor is the price for which judgment was given by the lower court.

Considerations outside the express, and, we believe, exclusive, language of the contract fixing prices for this service, are convincing that the judgment of the lower court is right. The court had before it evidence that on the morning of October 15, 1925, in St. Paul, plaintiff submitted its bid to defendant and was advised at noon that the contract had been awarded to plaintiff. During the afternoon of that day a number of price items were discussed and changed at the request of the chief engineer of defendant. During the discussion plaintiff's superintendent called defendant's attention to the fact that team haul was mentioned in only two items (R. 259), those dealing with concrete pipe and corrugated iron pipe (R. 59). The suggestion was made because plaintiff wanted

it clearly understood that the manner of hauling would not affect the price. Thereupon the defendant struck out the words "team haul" and inserted in lieu thereof the word "hauling" (R. 261). This action speaks for itself and we think effectually commits the parties to the proposition that these prices named in the contract applied to transportation of bridge materials by any means whatsoever.

Campbell v. Trustees Cincinnati Southern Ry. (1888) 9 Ky. L. Rep. 799, 6 S. W. 337, 338.

Defendant argues on brief that there was no finding on the subject of the effect of this change (R. 63). In this counsel is in error. In the form suggested such finding would be purely evidentiary. The finding of the court is that the contract stipulated the prices claimed, and that finding covers all of the evidence to support the finding. The intent of the change is clear on its face.

Other considerations are convincing. No charge was made for cars used in hauling commercial freight (R. 212, 249). If this material haul was to be considered as commercial haul where moved by rail (and that is the contention of defendant) then there would be no rental charge for the cars used in hauling these materials by rail. But plaintiff was charged a rental for cars used in this service, clearly marking it as other than commercial haul (R. 260). A further consideration is that the plaintiff did not have the burden of loading and unloading any commercial freight. The shipper loaded the cars and the cars were then moved by plaintiff on instructions of defendant's resident engineer (R. 212, 224, 241, 248). But in handling the articles constituting the material haul, there was a heavy burden imposed upon plaintiff in sorting, loading and unloading the cars. The stipulated prices were not sufficient to cover the cost of this work as to some of the material moved (R. 260-261). The metal fastenings were all types stipulated in the contract, the moving of which would not require much sorting, but bridge timbers, piling,

etc., would depend upon the requirements of each specific bridge; also they are much heavier articles, difficult to load, requiring more men and mechanical force, all of which explains the difference in price in hauling the various articles (including the handling) whether by rail, truck or otherwise. The prices did not cover merely the cost of moving a car by rail, as suggested by defendant.

Defendant's further discussion of the bridge material haul is divided into two parts on brief, opening with the assertion of a submission and ruling (Brief p. 66), and closing in the second section of the argument with a discussion of what amounts to a submission and ruling (Brief, p. 76).

We think we can be of better assistance to the court if the several points involved in these contentions are separated. We shall discuss, first, whether there was a submission at all, second, whether the question is one that could be submitted, and, third, whether there was a ruling of a nature that would be binding upon anyone.

(1) *In limine* defendant is confronted with the fact that the court found that there was not a submission of this matter to the chief engineer, and that any ruling claimed to have been made by that officer was arbitrary and coercive. His finding was in accord with the conclusions of the auditor (R. 329).

We challenge defendant's statement, which is repeated a number of times during the argument, that demands were made, or a dispute or misunderstanding or disagreement existed between plaintiff and defendant's resident engineer with respect of the material haul prices. The facts are that in August 1926 plaintiff called the attention of the resident engineer to an omission in making the July estimate; he overlooked material haul items on bridge No. 1, which apparently had been under construction in July. Plaintiff requested that the amounts be included in the

August estimate (R. 269). There is in this no demand of any kind. It was such a letter as would have been written had any portion of the work performed in a month been overlooked in making the estimate. The answer to this is significant. The resident engineer acknowledged receipt and stated he had referred the question to Mr. Stevens (R. 270). Now then, insofar as the only request was that an omission from the estimate be inserted in the succeeding estimate, we submit that no one can read into these two letters a disagreement, dispute or controversy of any kind as to the *prices* to be paid. These were stipulated in the contract. The resident engineer did not suggest any disagreement as to price. The question involved was whether the work omitted from the July estimate should be included in the August estimate. The resident engineer does not indicate that he is in disagreement in any respect with plaintiff. We were not favored with the letter of the resident engineer referring this matter to the chief engineer, and do not know whether he agreed with plaintiff and merely requested authority to include in the August estimate the matter overlooked in the July estimate. The record is barren of anything to show any disagreement. The witness, however, did testify that after the alleged ruling by the chief engineer, witness doubted the applicability of the commercial haul rate (R. 271-272).

The provision of the contract upon which defendant relies permits the chief engineer to act as umpire to decide any disputes or misunderstandings that may arise in the course of the work (R. 55-56). We say no condition had arisen justifying resort to the umpire.

We further say that a submission of a dispute of this nature must be by joint action of the parties concerned.

(2) Aside from the fact that there was no dispute or misunderstanding and no submission such as is contemplated by arbitration provisions of contracts, the question involved was one that could not be committed to the chief engineer, and was not intended to be committed by the

contract between the parties. There is no question of the right of parties to contract that all questions of a technical nature, such as classification, measurement, manner of doing work, sufficiency of work performed, etc., may be submitted to a designated arbitrator and his decision made final. Neither is their question but what the judgment of a designated person may be conclusive as to whether extensions of time should be granted, whether a contract has been performed, etc., but there is a well established distinction between such matters and those that deal with questions of law. The latter may not be made the basis of submission to an engineer. Decision of such matters is reserved for the courts.

A stipulation to submit all matters arising during performance of the contract to decision of the engineer (if interpreted to include questions of law as to what the contract is and the rights of the parties thereunder) is against public policy because it invades the province of the court.

Haskell v. McClintic-Marshall Co. (1923) 289 Fed. 405, 409 (9th CCA).

Passaic Valley Sewerage Commissioners v. Tierney (1924) 1 Fed. (2d) 304, 307 (3rd CCA).

Ray v. Luzerne County (1932) 58 F. (2d) 829, 830 (D. C. Pa.)

National Contracting Co. v. Hudson River Water Power Co. (1908) 192 N. Y. 209; 84 N. E. 965, 969.

Barron v. Burnside (1887) 121 U. S. 186; 30 L. Ed. 915, 919.

Tribble v. Yakima Valley Transp. Co. (1918) 100 Wash. 589, 171 Pac. 544, 549.

Nelson Bennett Co. v. Twin Falls L. & W. Co. (1908) 14 Idaho 5; 93 Pac. 789, 795.

Wortman v. Montana Central Ry. Co. (1899) 22 Mont. 266, 56 Pac. 316, 320.

Whether the contract specified the prices claimed, or something different, had nothing to do with those matters that would arise during work of a technical nature that

should be decided on the ground. The question involved was one of law, upon which plaintiff's right to a decision of the court that could not be cut off by any action of the chief engineer.

Furthermore, any decision of the chief engineer contrary to the contract would be void. Even as to matters held to come within the purview of the arbitration clause, the engineer is not permitted to decide contrary to the express terms of the contract.

Ahrens v. City of Reading (1918) 261 Pa. 100; 104 Atl. 511.
Dyer v. Middle Kittitas Irr. Dist. (1905) 40 Wash. 238; 82 Pac. 301, 302.
Mills v. Norfolk & Western R. Co. (1894) 90 Va. 523; 19 S. E. 171, 173.
Williams v. Mt. Hood Ry. & Power Co. (1910) 57 Or. 251, 259; 110 Pac. 490.

In the language of the court in the case of *Mills v. Norfolk & Western R. Co., supra,* denying the contention that the engineer may decide contrary to the express language of the contract (top. p. 173, of S. E.):

> "* * the predication is that, though the price is fixed by the contract, it emasculates itself,—commits felo de se,—and makes the engineer the absolute, final, and arbitrary dictator of the price or rate of compensation which the contractors shall receive * *."

Such is the holding in two of the cases cited by defendant on brief.

The court in *Memphis Trust Co. v. Brown-Ketchum Iron Works* (1909) 166 Fed. 398 (6th CCA) ruled (p. 406) that an umpire to whom matters were formally submitted could not decide contrary to the agreement, and that the decision would be set aside insofar as it was so contrary.

In *Corporation of Charles Town v. Ligon* (1933) 67 F. (2d) 238 (4th CCA) the court in sustaining provisions for arbitration of disputes ruled (bottom first column p. 244) that the lower court was correct in construing the contract differently than it had been construed by the arbitrator and the trial court was sustained in allowing payment based upon a proper construction of the contract.

The long list of cases cited by defendant on brief in connection with arbitration disclose defendant's failure to distinguish between the kind of questions that can be committed to arbitration by contract before work begins, and the questions of law that may not be so committed. Without discussing these cases severally, because it would require too much space, they may be readily divided into classes into more than one of which some of the cases fall. No one of them upholds the right to submit to an arbitrator questions of law such as here involved.

(1) One of the cases involved the right of an engineer to terminate a contract and refuse extension of time where that power was reserved and made to rest entirely in the judgment of the engineer. It involved a question of fact. In this very case however those matters of law involved were determined by the court.

United States v. Gleason (1900) 175 U. S. 588; 44 L. ed. 284.

(2) Of the cases cited by defendant, the following are all cases which involved questions of fact of a technical nature properly left to a technical man.

McCullough v. Clinch-Mitchell Const. Co. (1934) 71 F. (2d) 17, 21 (8th CCA).

Chicago, Santa Fe & California R. Co. v. Price (1891) 138 U. S. 185, 34 L. ed. 917.

Ripley v. United States (1912) 223 U. S. 695, 56 L. ed. 614, 619.

Merrill-Ruckgaber Co. v. United States (1916) 241 U. S. 387, 60 L. ed. 1058.

Kennedy v. City of White Bear Lake (1930) 39 F. (2d) 608, 610 (8th CCA).
Penn Bridge Co. v. Kershaw County (1915) 226 Fed. 728 (4th CCA).
Smith v. Copiah County (1916) 239 Fed. 425 (D. C. Miss.)

(3) In the following cases cited by defendant, the court in fact construed the contract, in some of the cases agreeing with the engineer, and in others disagreeing:

Kihlberg v. United States (1878) 97 U. S. 398, 24 L. ed. 1106.
Merrill-Ruckgaber Co. v. United States (1916) 241 U. S. 387, 60 L. ed. 1058.
Penn Bridge Co. v. Kershaw County (1915) 226 Fed. 728 (4th CCA).
Corporation of Charles Town v. Ligon (1933) 67 F. (2d) 238, 244 (4th CCA).
Smith v. Copiah County (1916) 239 Fed. 425 (D. C. Miss.)

(4) In the following cases cited by defendant that portion of the decision of the engineer dealing solely with a question of fact was sustained, the court construing the contract in other respects:

Kihlberg v. United States (1878) 97 U. S. 398, 24 L. ed. 1106.
Penn Bridge Co. v. Kershaw County (1915) 226 Fed. 728 (4th CCA).

(5) And the following case was one in which advance ruling of the chief engineer on a question of fact was essential to the presentation of a claim:

United States v. Mason & Hanger Co. (1922) 260 U. S. 323, 67 L. ed. 286.

In no one of the cases cited by defendant was there involved a failure to extend full right of hearing to either side; no one of them involved an arbitrary ruling without

hearing what the claimant may have had to present, with full opportunity of presentation; no one of them involved a question of law such as is presented here; no one of them sustained a decision contrary to the express terms of the contract.

We submit that the correctness of the law laid down in these cases may be admitted without in any degree depreciating the authority of the decision of this court in the case of *Haskell v. McClintic-Marshall Co., supra,* that an attempt by contract to deprive a party of his right to a court decision on questions of law is against public policy. In that opinion the court cited a construction contract case.

The case of *McCullough v. Clinch-Mitchell Const. Co., supra,* which did not involve the submission of legal questions to an engineer, nevertheless clearly limits contractual requirements for arbitration to matters of a factual nature. The reasoning of the court confirms what we have been trying to state (bottom second column, p. 21, of 71 F. (2d)):

> "All construction contracts involve matters as to character of materials, of work, and of methods of doing the work. Determination of such is necessarily a matter of judgment and often the diverse interests of the parties cause difference of opinion with resulting disputes concerning them. It is to the interest of all parties that these disputes be promptly determined and by some one having special knowledge of such matters and who can act upon personal knowledge of the controlling facts. With this decided and well recognized usefulness, if not necessity, for such arrangements in construction contracts and with the complete provision as to arbitration with the above waiver clause eliminated, we can not believe that the parties here had in mind that arbitration would be undesirable if decisions thereunder did not bar legal remedies.'

Incidentally, the case clearly holds that the contract for arbitration is not a submission; that the parties must agree to the submission when disputes arise. It is not an unilateral act, as defendant seems to think.

A like ruling is made in *Corporation of Charles Town v. Ligon* (1933) 67 F. (2d) 238, 244 (4th CCA). At page 244 the court rules that even though the engineer decided a $1,200 item assertedly under the arbitration clause, the matter had not been submitted by the parties for arbitration. This means submission by both parties—the town had submitted and was defending the submission.

(3) We think there can not be a submission or decision where the engineer acts arbitrarily and without opportunity for hearing. By opportunity for hearing, we mean a hearing at a time when representatives of either side may have the subject in hand and be prepared to present at least their contentions.

The circumstances under which this decision was made mark it as arbitrary and coercive. Mr. James F. Twohy was secretary of plaintiff. He was not on the job at Orofino but was looking after outside work in connection with that job. Mr. Twohy went to St. Paul in connection with finances for this particular job, obtained an advance against the retained percentage and was about to leave, when the chief engineer on his own motion raised two questions: (1) the log haul, which was far in the future, and (2) the prices to be paid for the material haul (R. 212). The chief engineer admits that he himself raised the question and immediately ruled that he would not pay the contract prices (R. 234). Now, at this time, Mr. Twohy knew nothing about the exchange between plaintiff's superintendent on the job and the resident engineer and did not have in his mind the terms of the contract. He was in no position to discuss the matter or to present any arguments in behalf of plaintiff. He did all that he could do under the circumstances,—expressed a willingness to abide by the contract. The chief engineer, being advised

by Mr. Twohy that the latter did not have in hand any information on the subject, offered no opportunity for an informed presentation by plaintiff, but ruled out of hand as to what he would do, and then proceeded to state that plaintiff could *consider that matter settled.* His statement was preceded by a threat of the use of his power as chief engineer if plaintiff saw fit to demand that which the contract gave him a right to demand.

For the engineer to thus himself raise a question of this nature in order that he may decide it without hearing is itself such misconduct as disqualifies him to rule.

> *Maysville, W. P. & L. Turnpike Road Co. v. Waters* (1837) 6 Dana (Ky.) 62, 67.

For him to rule, however the question is raised, without an opportunity for hearing, again marks him as disqualified in the premises.

> *Marks v. Northern Pacific R. Co.* (1896) 76 Fed. 941, 946 (9th CCA).

Defendant argues on brief that a hearing is not necessary. Assuming that a hearing involves producing witnesses, etc., he admits that *9 C. J. 770* states the general rule that a hearing is necessary, but claims that the supporting cases have been overruled. In this we think counsel is mistaken. The leading case on the subject is yet

> *McMahon v. New York & Erie R. Co.* (1859) 20 N. Y. 463, 466.

Defendant says (Brief p. 77) that this case was overruled by the case of *Sweet v. Morrison* (1889) 116 N. Y. 19, 22 N. E. 276. We think defendant is in error. The court in that case ruled that the parties by their conduct had waived the right to a hearing (the decision was so construed in the later case of *Stefano Berizzi Co. v. Krausz* (1925) 239 N. Y. 315, 146 N. E. 436, where the court

points the distinction with respect of technical matters that may be submitted to an engineer). A hearing was in fact held in the case of *Sweet v. Morrison, supra,* the complaint being that the arbitrator did not personally measure the work and refused to permit the plaintiff to call witnesses to disagree with the measurements made by the arbitrator's agents. The litigation was between the contractor and a subcontractor.

Defendant further says that the early case of *Korf v. Lull* (1873) 70 Ill. 420, specifically overruled the Illinois case cited by *Corpus Juris.* But in the case of *Korf v. Lull, supra,* the quarrel was not between the parties to the contract, but between a subcontractor and the builder. The court found there was no dispute. The question was finality of the architect's certificate accepting the building—the kind of decision that rests in the architect's judgment.

Later Illinois decisions require notice where a dispute exists.

Young v. Wells Glass Co. (1900) 189 Ill. 626, 58 N. E. 605.

The general rule is that a contract providing for arbitration can be complied with only by a fair opportunity for hearing.

Morse, Law of Arbitration and Award, p. 117.
Page on Contracts, Sec. 2536.
Slater v. LaGrande Power Co. (1903) 43 Or. 131 72 Pac. 738.
Marks v. Northern Pacific R. Co. (1896) 76 Fed. 941, 946 (9th CCA).
Curran v. City of Philadelphia (1919) 264 Pa. 111, 107 Atl. 636, 639.
Meloy v. Imperial Land Co. (1912) 163 Cal. 99, 124 Pac. 712.

This contract in respect of the umpire provision is the ordinary agreement to submit to a named arbitrator such disputes as may arise and calls for a fair observance of the

rules governing arbitration. The common law rule of arbitration undoubtedly requires notice and an opportunity for hearing. It will not do to say that this is not an arbitration clause. It is captioned in the contract "Arbitration"

The Supreme Court, however, in *Red Cross Line v. Atlantic Fruit Co.* (1924) 264 U. S. 109, 68 L. ed. 582, 587, ruled that where there is an agreement to submit to arbitration and the agreement does not provide the machinery, the arbitration must proceed according to the state law, if there is a state law on the subject.

At the time this contract was being performed the state of Idaho had a law governing arbitration proceedings, as did the state of Oregon. As we read this law, it requires a formal hearing. We quote two of the sections of the Idaho Code annotated:

Sec. 13-904

> "Arbitrators have power to appoint a time and place for hearing, to adjourn from time to time, to adminster oaths to witnesses, to hear the allegations and evidence of the parties, and to make an award thereon."

Sec. 13-905

> "All the arbitrators must meet and act together during the investigation; but when met a majority may determine any question. Before acting they must be sworn before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties in relation to the matters in controversy, and to make a just award according to their understanding."

Defendant cites on brief, as opposed to the wealth of authority to the contrary, the case of *Norcross v. Wyman* (1904) 187 Mass. 25, 72 N. E. 347. The case, however, involved one of those technical matters which the engineer

decides on the ground. He ruled that a material encountered was quicksand, not covered by the contract, and required extra work and expense.

The threat of the chief engineer of defendant, coupled with his arbitrary ruling, is alone sufficient to destroy its validity. Under those circumstances, continuing with the work and reserving for a court the question of the compensation provided in the contract is not acquiesence on the part of plaintiff.

United States v. Smith (1921) 256 U. S. 11, 65 L. ed. 808, 810.

Here a request for extra compensation because unexpected material was encountered was rejected and reprisals threatened. To the contention that the decision of the engineer and acceptance of pay thereunder was final, the court said (middle p. 810, of L. ed.):

> "The contention overlooks the view of the contract entertained by Colonel Lydecker, and the uselessness of soliciting or expecting any change by him. His conduct, to use counsel's description, 'though perhaps without malice or bad faith in the tortious sense,' was repellent of appeal or of any alternative but submission with its consequences."

The court will recall that the chief engineer of defendant in raising and announcing a ruling on this material haul foreclosed any further suggestion or argument from plaintiff. That such coercion prevents a claim of acquiesence, estoppel or waiver, has been held too frequently to require argument.

Union Pacific R. Co. v. Public Service Commission (1918) 248 U. S. 67, 63 L. ed. 131, 133.

Panther Rubber Mfg. Co. v. Commissioner of Internal Revenue (1930) 45 F. (2d) 314, 316 (1st CCA)

A wealth of authority is gathered in a note in *79 A. L. R. at page 657.*

Now, it was after this coercion that Mr. Twohy, suffering from the fear and worry caused thereby, enroute home from St. Paul wrote by hand the letter so much relied upon (R. 196-198). As we have heretofore pointed out, the letter in no sense amends the contract (if a secretary of a corporation, without any authority from his company, could amend the contract) and waives nothing; indeed, expressly reserves the rights provided in the contract, both as to duties and prices (R. 197). If it did more, the circumstances under which it was written would deny to defendant the right to claim anything therefrom.

The letter does attempt to leave to the chief engineer the decision of the questions of law involved in the contract. This court is definitely committed to the proposition that such an effort is against public policy (this brief p. 40). Being against public policy, it can not be effected by a letter written after the contract was drawn, any more than an effective provision of that nature could be written into the original contract.

Cecil B. DeMille Productions v. Woolery (1932) 61 F. (2d) 45, 49 (9th CCA).

Hall v. Coppell (1869) 74 U. S. 542, 19 L. ed. 244, 248.

Public policy can't be defeated by alleged acquiesence or consent after the contract is written. This would permit a contract contrary to public policy to be validated the day after it was written.

CONCLUSION

We submit:

(1) That the court properly ruled that plaintiff was entitled to conduct the commercial haul until the road was completed, and was damaged by the breach; we contend that the award on this item should be increased as claimed on plaintiff's cross-appeal.

(2) That the court properly ruled that plaintiff should be paid the prices stipulated for hauling bridge materials; we contend that the award on this item should be increased by the allowance of interest as claimed on plaintiff's cross-appeal.

De Lancey C. Smith,
W. Lair Thompson,
McCamant, Thompson, King & Wood,
Attorneys of Appellee and Cross-Appellant.